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September 22, 1997

BY HAND DELIVERY

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

Re: US West Request for Stay Pending Judicial Review in CC Dockets 96-98 and 95-185

Dear Mr. Caton:

Pursuant to the FCC's Public Notice DA 97-1977, released September 12, 1997, enclosed for filing in the above-referenced docket are the original and four copies of the "Opposition of WorldCom, Inc., to US West Request For Stay."

Please return a date-stamped copy of the enclosed (copy provided)

Respectfully submitted,

Linda L. Oliver
Counsel for WorldCom, Inc.

Enclosures

cc: Janice Myles
ITS, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
	)	
US West Request for Stay Pending Judicial Review	)	

OPPOSITION OF WORLDCOM, INC. TO US WEST REQUEST FOR STAY

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SUMMARY

US West's request for a stay of the FCC's Shared Transport Order should be denied because US West has failed to show that any of the four requirements for grant of a stay pending judicial review have been satisfied.

First, US West is unlikely to succeed on the merits of its appeal. The FCC's decision clarifying that shared transport is a required network element is consistent with the statutory definition of "network element," which includes "all features, functions, and capabilities" provided over local exchange facilities and equipment. 47 U.S.C. 153(29). As the Eighth Circuit concluded in upholding the FCC's decision to classify operator services and operational support systems (OSS) as network elements, the term "network element" encompasses much more than the mere physical components of the network. US West's arguments that shared transport is not a network element because it is a service, because it does not require the purchase of network capacity, and because it is priced on a usage-sensitive basis, all must fail.

US West also fails to satisfy the second part of the four-part test for a stay, because it has not demonstrated that it will suffer irreparable harm if the shared transport decision is not stayed. US West's real complaint -- that shared transport combined with other network elements will enable other carriers to compete for US West's local customers -- is true of all forms of local entry. US West is attempting to hold on to what it views as subsidies to universal service embedded

in its retail revenues. But the Act, as the Eighth Circuit recognized, does not allow such implicit subsidies to threaten the development of local competition.

US West nevertheless contends that competition via combined network elements could proceed so fast that its alleged "subsidy" revenues would decline precipitously. But it is unlikely that competitors will be able to take on significant numbers of new customers via the network element platform any time soon. If the operational issues that have slowed entry via unbundled loops and resale are any indication, broad-based entry via combined network elements will be delayed some time even after ILECs, such as US West, stop litigating against it and begin to offer it.

US West also fails to address the harm to potential competitors and consumers that would result from a stay. Without shared transport, the option of entry via combined network elements is not viable as a practical matter. Entry via combined network elements has the greatest potential to bring competitive choices to consumers regardless of where they live, not just to those customers in areas that justify construction of competing local network facilities. Resale of existing ILEC retail services does not yield the same consumer benefits. The harm to the public interest from delay in the development of local competition would be substantial.

In sum, US West has failed to satisfy the four-part test for a stay. Its request should be denied.

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	)	
US West Request for Stay Pending Judicial Review	)	

OPPOSITION OF WORLDCOM, INC. TO US WEST REQUEST FOR STAY

WorldCom, Inc., by its attorneys, submits its opposition to the Request for Stay Pending Judicial Review of the FCC's Third Order on Reconsideration in the captioned proceeding, filed on September 9, 1997, by US West, Inc. ("US West"). 1/ The Commission should deny the stay petition because US West has failed to satisfy any of the four prerequisites for grant of a stay. 2/

1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295, released August 18, 1997 ("Shared Transport Order"). This opposition is filed pursuant to the FCC's Public Notice, DA 97- 1977 (released September 12, 1997).

2/ Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

I. US WEST IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL.

The request for stay should be denied because US West is not likely to succeed on the merits of its appeal. US West argues that the FCC incorrectly determined that shared transport is a network element within the meaning of Section 251(c)(3) and Section 3(29) of the 1996 Telecommunications Act. 3/ None of the arguments raised by US West undermines the correctness of the FCC's decision. 4/

First, shared transport clearly falls within the statutory definition of a network element. The Act defines network element to include not just the physical facilities and equipment of the incumbent LEC's local exchange network, but also the "features, functions, and capabilities" of the equipment and facilities that make up the network. 47 U.S.C. § 153(29). The Eighth Circuit confirmed this broad reading of the term "network element," and confirmed the FCC's authority to adopt rules defining required network elements. 5/ The Court specifically rejected ILEC arguments that network elements are limited to the "physical parts of the

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3/ See Telecommunications Act of 1996, 47 U.S.C. §§ 251(c)(3), 153(29) (hereafter "the Act" or "the 1996 Act").

4/ US West Request for Stay Pending Judicial Review, filed September 9, 1997, at 9-15 ("Stay Request").

5/ Iowa Utilities Board v. FCC, 8th Cir. Nos. 96-3321 et al. (July 18, 1997), 1997 WL 403401 at *19-20, petitions for rehearing pending ("Iowa Utilities Board").

network." 6/ The Court also rejected arguments that if a network function is already offered as a "service" by the ILEC, that function cannot also simultaneously be considered a network element available to requesting carriers at cost-based rates. 7/

The fact that shared transport is available on an on-demand basis, priced on a usage basis, does not change its character as a network element. Operator services, signaling, database lookups, and many aspects of operational support systems, for example, will be provided on an as-needed basis and priced on the basis of usage. They also could be described as "services." Yet these all are clearly network elements, as Eighth Circuit held. 8/ US West completely ignores this aspect of the Court's decision. US West's observation that "shared transport is nothing more than the service of transporting calls from place to place" is irrelevant to whether shared transport is a network element. 9/

6/ Id. at *19.

7/ Id. at *19-21.

8/ Iowa Utilities Board at *21.

9/ Stay Request at 11. In addition, as the FCC recognized in the First Report and Order in this docket, unlike exchange access *services* (and retail services), *network elements* are neither interstate nor intrastate in nature, but rather permit requesting carriers to provide all services, both interstate and intrastate, over those elements. First Report and Order in CC Docket No. 96-98, August 8, 1996, at para. 448.

US West also argues that shared transport cannot be a network element because it affords the purchaser "neither exclusive access to any facility nor the right to use one for any specified period of time." 10/ As the Eighth Circuit held, nothing in the Act limits network elements in this way. On the contrary, US West's argument is flatly contradicted by the statutory definition of network element -- which encompasses the "features, functions and capabilities" of network equipment and facilities, in addition to the equipment and facilities themselves. 47 U. S.C. § 153(29). The Eighth Circuit squarely adopted this reading of the statutory term, stating that network elements are not limited to the "physical components" of the network. 11/ With respect to access to operational support systems, for example, the Court held that

> the offering of telecommunications services encompasses more than just the physical components directly involved in the transmission of a phone call and includes the technology and information used to facilitate ordering, billing, and maintenance of phone service -- the functions of operations support systems. 12/

If US West were correct in its view, then many network elements would be eliminated from the mandatory list expressly upheld by the Eighth Circuit. Similarly, US West's argument that network elements must be capable of being

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10/ Stay Request at 11.

11/ Iowa Utilities Board at *20.

12/ Iowa Utilities Board at *20.

physically severed from the network ignores the fact that many elements are not physical network pieces, but rather functionalities. 13/

At bottom, US West's attack on the FCC's shared transport decision is a thinly disguised effort to destroy the right of requesting carriers to purchase all network elements in combination, without having to provide some facilities of their own. This is an argument, however, that US West already has lost, before the Eighth Circuit. That court squarely confronted and rejected arguments that the purchase of all network elements in combination is equivalent to resale of retail services under Section 251(c)(4). The fact that shared transport is one of the network elements does not change the fact that what is being purchased is network elements, not retail services.

As the FCC stated in its First Report and Order in this docket, combined network elements and retail services are entirely different things, with different advantages and disadvantages. 14/ For example, entrants purchasing

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13/ Stay Request at 11. US West also misapprehends the meaning of "unbundling." Historically unbundling has meant the separate offering and pricing of services and/or equipment, not the physical separation into parts of those services. For example, when the FCC decided in Computer III to require the BOCs to provide on an unbundled basis the basic service elements (BSEs) required by competing enhanced service providers, it did not expect (nor was it necessary) that the BOCs would physically separate and separately provision each BSE. Rather, the BOCs were required to *offer and price* the BSEs separately. See Third Computer Inquiry, 104 FCC 2d 958, 1064-44 (1986), California v. FCC, 905 F.2d 1217 (9th Cir. 1990); California v. FCC, 4 F.3d 1505 (9th Cir.); California v. FCC, 39 F.3d 919 (9th Cir. 1994).

14/ See also, e.g., Ex parte Notice in CC Docket No. 96-98 of WorldCom, Inc., Letter from Linda L. Oliver to William F. Caton, May 23, 1997, at 4-6. The ex parte

[Footnote continued]

combined network elements "have greater opportunities to offer services that are different from those offered by incumbents. . . . The ability to package and market services in ways that differ from the incumbents existing service offerings increases the requesting carrier's ability to compete against the incumbent and is likely to benefit consumers." 15/ Carriers purchasing combined network elements also are able to offer exchange access, which carriers reselling ILEC retail services cannot do. 16/

US West nevertheless argues that if shared transport is included as a network element, the purchase of a combination of elements somehow loses its character as network elements and becomes a retail service that is available only via resale. But every one of the distinctions identified by the FCC and by the Eighth Circuit between network elements and resale in its First Report and Order

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[Footnote continued]

describes the advantages inherent in purchase of combined network elements that are not available through service resale. They include: (1) the ability to compete in the design, pricing, timing, packaging, and scope of retail offerings; (2) the ability to provide the full range of services (including exchange access services) that the ILEC does; (3) payment of cost-based rates for network elements, which enables real price and service design competition; (4) the ability to create pressure on services that are priced above-cost today, such as exchange access; (5) eligibility for universal service support; (6) the sending of correct investment signals, so that economic investment is made in new local facilities; and (7) the ability to replace gradually, as economically justified, the ILEC's network elements with new construction. Id.

15/ First Report and Order in CC Docket No. 96-98, August 8, 1996, at paras. 332-333.

16/ Id. at para. 333.

continue to apply, whether a requesting carrier employs shared transport or dedicated transport to haul traffic between switches.

US West also contends that purchase of combined network elements with shared transport as one such element is less risky than purchase of combined network elements with dedicated transport, citing the Eighth Circuit's discussion of increased risk as one factor that distinguishes combined network elements from resale. 17/ US West's argument that there are no risks in purchasing combined network elements (when shared transport is a part of that combination) is both irrelevant as a matter of law and incorrect as a matter of fact.

First, risk has nothing to do with whether a particular network functionality is a "network element." Operator services and OSS, which the Eighth Circuit specifically affirmed as network elements, do not require the requesting carrier to purchase the network element on a "capacity" basis or to assume the risk that that an ILEC's capacity will not be fully used. It also is not essential, for purposes of defining a particular network element, that there be specific risk involved with purchasing that element, or that the element be paid for on a flat-rated (capacity) basis, rather than on a usage-sensitive basis, as US West contends. 18/ If US West's arguments about risk and usage-based pricing were correct, then operator services, OSS, and signaling (to name a few) have been

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17/ Stay Request at 12, citing Iowa Utilities Board, slip op. at 144.

18/ Stay Request at 12.

incorrectly identified as network elements. The Eighth Circuit decision, in short, cannot mean what US West says it means, or the Court would have been in error in affirming the FCC's classification of OSS and operator services as network elements.

US West also ignores the risks that carriers purchasing a combination of elements (including shared transport) will incur that carriers purchasing retail services for resale do not. First, carriers purchase the loop and the switching element on a per-customer basis, and pay the full cost of these and other network elements necessary to provide local exchange and exchange access. Second, these carriers assume the risk that they will not earn enough revenues from all services combined to cover the costs of the loop, the switch, transport, and other network elements it needs, their cost of billing and collecting from end users and IXCs, and the cost of developing interfaces with the ILEC for unbundled elements. Third, carriers purchasing combined network elements do not simply re-offer US West's "finished" retail services. They must define and design their own retail offerings; and they must bill and collect exchange access from IXCs. All of these differences apply equally whether a carrier uses shared transport or dedicated transport.

In sum, the availability of shared transport as a network element does not change the fact that combined network elements are different from resold retail services, and that both options are available as a matter of right from incumbent LECs.

II. US WEST WILL NOT SUFFER IRREPARABLE HARM IF IT IS REQUIRED TO OFFER SHARED TRANSPORT.

US WEST's claims of injury if a stay is not granted are speculative and contrary to reality. Mere financial loss is not enough to justify the extraordinary measure of stay relief. 19/ Moreover, any loss must be "both certain and great." 20/ US WEST has not demonstrated that either is the case.

First and foremost, US West will be fully compensated for the cost of the network elements. US West does not deny this. Instead, the thrust of US West's irreparable harm argument is that, because its retail rates bear no relationship to cost, it cannot be required to provide cost-based network elements, since it will lose the subsidy revenues embedded in its business rates when those business customers switch to the UNE platform provider. US West has not shown that its business local exchange rates necessarily subsidize its residential rates. It also has not shown that it could not cover any difference between the cost of providing residential service and the rate for local exchange service through revenues from other services.

In essence, US West is arguing that it is entitled to be insulated from revenue loss due to competition -- that it should be left revenue-neutral whenever it

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19/ Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) ("economic loss, does not, in and of itself, constitute irreparable harm.").

20/ Wisconsin Gas at 674.

loses a customer. That is not real competition. As the Eighth Circuit recognized, the Act contemplated that ILECs would lose revenues as competition takes hold:

> To the extent that some incumbent LEC customers decide to switch to competing carriers, we believe this result is entirely consistent with the Act's purpose to promote competition in local phone markets. Additionally, section 254 of the Act, entitled "Universal Service," reveals Congress's intent to overhaul the current system of support for universal service, which is based on the incumbent LECs' supracompetitive prices for certain services. See 47 U.S.C.A. § 254. 21/

At bottom, US West is questioning the very premise of the Act: that competition in the local exchange will benefit consumers, bringing them lower prices and more choices of service provider. The Act also provides that implicit subsidies such as those claimed by US West, are incompatible with competition. The Act thus prohibits incumbent LECs from using revenues from a noncompetitive service to subsidize a competitive service. 47 U.S.C. § 254(k). The FCC has stated its commitment to eliminating implicit subsidies on the interstate side; it is up to the state commissions to remove such subsides, if they exist, from local business rates.

Finally, it is unlikely that competitors will be able to take on significant numbers of new customers via the platform any time soon. The truth is that the option of local entry through combined unbundled elements does not yet

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21/ Iowa Utilities Board v. FCC at *27 n. 34.

exist, except on paper. 22/ US West has consistently refused to offer combined elements, even though the FCC's August 1996 order requiring the offering was never subject to a judicial stay. 23/ The many operational problems that have arisen in connection with other methods of entry -- service resale and unbundled loops, for example -- suggest that even if the RBOCs were to quit litigating and start implementing the network platform, it would take some time before it is operational and even more time for competitors to win over customers in any large measure. Every new entrant has to win local customers customer-by-customer, and has to persuade each customer to leave the security of the monopoly provider.

US West assumes that following the issuance of an FCC order clarifying the ILECs' obligations to provide shared transport, competition would take off like a rocket, with every one of US monopoly customer base jumping to competitors. Would that it were so simple to implement the opening of local

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22/ Combined network elements still are not being employed by competitors anywhere yet to provide service on a commercial basis, to our knowledge, even in Bell Atlantic/NYNEX territory, where that RBOC had already agreed, before issuance of the Shared Transport Order, to offer shared transport in combination with other network elements. See Application of NYNEX Corp. and Bell Atlantic for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries, FCC 97-286, released August 4, 1997, at para. 190. At most, the platform configuration is still being tested and defined in the Bell Atlantic/NYNEX states, to our knowledge.

23/ See, e.g., Application of US West Communications, Inc. for Rehearing, Reargument, and Reconsideration, filed August 18, 1997, in Investigation and Suspension of Tariff Sheets Filed by US West Communications, Inc., Colorado Public Utilities Commission Docket No. 96S-331T, at 5 (asking Colorado Public Utilities Commission to reconsider its decision directing US West to remove tariff language restricting combination of network elements).

exchange networks! If local competition were to move as fast as US West fears, moreover, it would likely be because the 14-point competitive checklist had been implemented fully. In that case, an RBOC might well be able to justify grant of an interLATA entry application. InterLATA revenues would go far to offset any revenue losses on the local side.

In short, it is highly unlikely that US WEST will lose local customers via unbundled elements with any speed, and thus any loss in local exchange and access revenues is likely to be gradual, incremental, and minimal. 24/ In contrast, as discussed in the next two sections, the harm to others and the public interest from a stay, on the other hand, would be enormous.

By attempting to block implementation of this important network element, essential to the platform, US West would have the Commission single out one form of competitive entry and effectively prohibit it. Every argument advanced by US West as a basis for blocking this form of entry -- specifically, that competition could reduce US West's revenues, some of which it argues are used by US West to support universal service -- are equally true of any other form of entry, including entry via combined network elements using dedicated rather than shared transport. All forms of competition have the goal of attracting business customers away from

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24/ If US West is concerned about harm in the long run, the solution is not to halt competition in its tracks, but rather to seek expedited briefing from the reviewing Court.

the incumbent monopoly carrier, and have the same potential to reduce any universal service contributions that arguably are embedded in retail rates.

The solution to this problem -- assuming it exists -- is not to block competition. The Act gave the FCC the authority to define what network elements requesting carriers are entitled to. The Act does not contemplate that a network element, once defined, will nevertheless be unavailable to requesting carriers. In fact, it is the network element platform - with shared transport as one element -- that will allow competitive choice to be brought to the broadest range of consumers, including those for whom constructing facilities is not cost-effective.

In sum, US West has failed to show that it will be irreparably harmed in the absence of a stay.

III. A STAY WOULD HARM CONSUMERS AND COMPETITORS – AND THUS THE PUBLIC INTEREST – BECAUSE IT WOULD HAVE THE PRACTICAL EFFECT OF MAKING THE OPTION OF COMBINED NETWORK ELEMENTS UNUSABLE.

Issuance of a stay in this case would deprive consumers of the benefits of local competition and would cause irreparable harm to potential providers of competitive local exchange service. For these reasons, a stay would also harm the public interest.

As the FCC noted in the Shared Transport Order, without shared transport, the option of combining network elements becomes very expensive,

perhaps prohibitively so, particularly as carriers first begin to provide service in this way (which is the case for all entrants today). 25/

The likely practical effect of a stay is that no competitive entry will occur via this entry option. A stay would harm consumers as well as potential competitors by delaying indefinitely the ability of entrants to bring consumers a choice of local service provider. The network element platform is an important vehicle for offering competitive local service to a broad geographic area and to all customers -- large or small, residential and business -- regardless of where they live. Competitors only will be able to provide competing local exchange services to that limited class of customers for which construction of local facilities is economically justifiable (or via resale, where they will be able only to mimic the ILEC's retail offering).

Congress understood that potential entrants needed the ability to employ the incumbent local exchange carrier network -- at cost-based rates -- as a means to provide competitive local exchange service to a wide range of customers while entrants build out competitive local exchange networks as economically justified. Grant of this stay would take an important entry option off the table completely. It also would doubtless delay further the operational readiness of this entry option -- operational readiness that still has not arrived, for any RBOC.

25/ Shared Transport Order at paras 34-35. US West does not challenge these FCC conclusions.

It is no answer to say that resale of ILEC retail services is available. Service resale does not provide the same ability to innovate, to design different services, to compete on price, and to offer the full range of services that the ILEC provides. It also does not allow a carrier to gradually replace ILEC elements with its own or those purchased from another carrier.

Service resale also does not permit the requesting carrier to self-provide interexchange access, unlike purchase of network elements. The FCC relied on the existence of unbundled elements at cost-based rates as a competitive local entry vehicle as a reason not to impose prescriptive measures to reduce interexchange access charges, relying instead on a market-based approach to access reform. 26/ The FCC reasoned that the availability of entry via unbundled elements meant that competitors would be able to self-provision exchange access whenever they were successful in winning a local customer. 27/ If the FCC or a Court were to grant a stay of the shared transport decision, it would eliminate the practical ability of competitors to do this, except with respect to that group of customers that could viably be served via construction of duplicate local exchange facilities. If the shared transport decision were stayed the FCC would need to stay the effectiveness of the entire Access Charge Reform Order and immediately

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26/ Access Charge Reform, CC Docket No. 96-262, First Report and Order, FCC 97-158, released May 16, 1997, petitions for review pending, at paras. 262-274.

27/ Id. at para. 265.

reconsider its decision to put off, in favor of market forces, the need for prescriptive reductions in above-cost access charges. It also would have to put off indefinitely any consideration of further pricing flexibility for incumbent LECs facing local competition, because the predicate for such flexibility -- local competition -- would be gone.

Most important, the FCC could not grant any Section 271 application for interLATA entry if the Bell Operating Companies ("BOCs") are permitted to escape the requirement to provide shared transport. First, shared transport as defined by the FCC is a mandatory network element. During the uncertainty created by a stay, the FCC could not grant an interLATA application if the applicant were not providing shared transport. Second, without the practical ability to employ combined unbundled network elements to become a full-fledged local telephone company, potential local competitors of the BOCs will have only one realistic avenue for such activity: duplication (at least in part) of the incumbent LEC local network facilities. 28/ Since this is far from being economically justifiable today for all but a minority of customers, the predicate for BOC entry -- competition in the local market and the ability of its competitors to become local telephone companies themselves -- will be absent. Certainly it would be impossible

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28/ WorldCom is committed to investing substantially in new network facilities. See Ex Parte Notice in CC Docket No. 96-98 of WorldCom, Inc., Letter from Linda L. Oliver to William F. Caton, May 23, 1997, at 6-7. Nevertheless, it remains unrealistic to expect any carrier to be able to construct local facilities to serve every customer.

for the FCC to conclude that the public interest would be served by BOC entry under such a scenario. Thus, grant of a stay would not only put local competition on hold, it would of necessity also have to put BOC interLATA entry plans on hold.

CONCLUSION

US WEST's real goal in seeking a stay is to put yet another roadblock in the path of local competition while keeping for itself near-monopoly control of the local exchange market. Because US WEST has failed to satisfy any of the four requirements for grant of a stay, the FCC should deny the petition.

Respectfully submitted,

WORLDCOM, INC.

By: Linda L Oliver

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Dated: September 22, 1997

CERTIFICATE OF SERVICE

I, Barbara E. Clocker, hereby certify that on this 22nd day of September, 1997, copies of the foregoing "Opposition of WorldCom, Inc. to US West Request For Stay" were served by hand delivery, except where indicated, to the following:

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